IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN CHANG, AS NEXT FRIEND OF ALISON CHANG, A MINOR, AND JUSTIN HO-WEE WONG,	§	
Plaintiffs,	§	CA No. 3:07-cv-1767
V.	§	
VIRGIN MOBILE PTY LTD.,	§	
Defendant.	§	

DEFENDANT VIRGIN MOBILE (AUSTRALIA) PTY LTD.'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Defendant Virgin Mobile Pty Ltd. ("Virgin Australia") files this Reply to Plaintiffs Susan Chang, as next of friend of A.C. ("Chang" or "A.C.") and Justin Ho-Wee Wong's ("Wong") (collectively "Plaintiffs") Opposition to Virgin Australia's Motion to Dismiss. As discussed in Defendant's motion to dismiss and below, the Court should grant Defendant's motion to dismiss in its entirety.

I. SUMMARY OF CASE TO DATE.

Tellingly, Plaintiffs have not cited one deposition, one interrogatory answer, one request for admission and/or one document that Virgin Australia produced after Plaintiffs sought extension after extension to come up with any evidence to support their allegation that Virgin Australia should be subject to this Court's personal jurisdiction in Texas. Instead, Plaintiffs offer several cases not on point, coupled with attorney argument in lieu of evidence that Virgin Australia's uncited discovery responses "were patently inconsistent" with other filings, plus one lone third party affidavit from Yahoo! concerning the use of its Flickr site.[1] Even Yahoo!,

[1] *See* Affidavit of Yahoo! Custodian, Shannon Chance Baylor, attached as Exhibit 1to Plaintiffs' Response to Defendant's Motion to Dismiss ("Plaintiffs' Opposition"). The affidavit is more noteworthy on what it does not

however, cannot affirmatively attest to any purposeful activity by anyone in Texas for any time period, and further, cannot even attest to the subject picture ever being located, processed or transmitted from within Texas cyberspace- assuming that any of the foregoing would constitute purposeful activities in Texas when they do not. Moreover, any activity that has been alleged to exist concerns non-parties' (Virgin Australia's Australian vendor and its Australian sub-vendor) outbound activity directed to Australia, not purposeful contact directed to Texas. Plaintiffs have, therefore, failed to meet their burden of proof to maintain a suit against Virgin Australia in Texas that comports with the traditional notions of fair play and substantial justice afforded to all foreign defendants.[2]

II. DEFENDANT'S SITUS IS AS DISTANT AS ITS ALLEGED TEXAS' CONTACT.

Had Plaintiffs cited even one deposition, the Court would have known that there was no connection between Virgin Australia and Texas, the United States or a Flickr website. As Virgin Australia's Brand Communications Manager David Cain[3] testified, two Australia-based vendors[4] (Host and The Glue Society) designed and developed multiple advertising concepts for the new text-to-text marketing campaign identified as the "Are You With Us or What Campaign?".[5] Host and its Australia-based subcontractor, The Glue Society, presented three different

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say, as opposed to what it says: there is no statement that any of A. C.'s images were ever stored in Texas, let alone processed or transmitted in or from Texas during some undefined time period by Defendant's vendors.

[2] The Plaintiffs have judicially abandoned any claim to general jurisdiction. *See* Plaintiffs' Opposition, p. 11, § 1.

[3] *See* Cain Depo., p. 10, l. 13 - p. 11, l. 9; p. ll. 10–25; p. 13, ll. 13 -15; p. 16, ll. 6-18; p. 17, ll. 1-3; p. 17, l. 21- p. 18, l. 3; p. 39, l. 25 - p. 40, l. 12 (APP 5-37).

[4] There was no written agreement with vendor Host. Host is on a retainer, and is paid an additional hourly fee on a project specific basis. Host made the decision to use The Glue Society's services as a sub-vendor, and would have been responsible to pay the Glue Society for any work it would have performed. *See* Cain Depo., p. 13, l. 16 - p. 14, l. 1; p. 15, ll. 6 -16; p. 16, ll. 3-5; p. 17, l. 21 - p.18, l. 1; p. 33, l. 21 - p. 34, l. 2; p. 37, l. 9 - p. 39, l. 14; p. 41, ll. 6-23; p. 42 - ll. 15-20 (APP 5-37).

[5] *See* Cain Depo., p. 13, l. 16 - p. 14, l. 1; p. 15, ll. 6-12; p. 16, ll. 3-5; p. 16, l. 23 - p. 17, l. 3; p. 17, l. 21- p. 19, l. 12; p. 20, ll. 3-10; p. 20, l. 17 - p. 21, l. 11; p. 23, l. 25 - p. 24, l. 12; p. 24, l. 21 - p. 25, l. 16; p. 29, l. 17- p. 30, l. 5; p. 32, l. 11 - 14; p. 32, l. 23-– p. 33, l. 7, p. 39, l. 25 - p. 40, l. 23 (APP 5-37).

marketing concepts to Virgin Australia, with one concept including a picture and a slogan.[6] In addition to creating various slogans, The Glue Society was solely responsible for obtaining dozens of photographs for use with the picture and slogan concept.[7] Host, along with The Glue Society, presented approximately forty different photograph-slogan advertisements in a pre-determined arrangement to Virgin Australia, *i.e.*, a unique photograph was coupled with a unique slogan.[8] Out of the forty arranged advertising proposals, Virgin Australia selected approximately 17-20 advertisements from vendor Host and its sub-vendor that were eventually used in the 2 1/2 month Australia campaign.[9]

As the vendors for the design and creative development of the campaign, Host (in conjunction with The Glue Society) decided to use Flickr as a source for their photographs,[10] including Wong's picture of A.C. posted on the World Wide Web. At no time did Virgin Australia enter into an agreement with Wong in Texas, as the finished advertisement was provided to Virgin Australia in Australia, subject only to the right of attribution for Wong ("flickr.com/photos/chewywong") as provided by Host/The Glue Society.[11]

Finally, while certainly not germane to a jurisdictional analysis, Plaintiffs opine at length about the alleged damages that followed the alleged "incitement."[12] However, the alleged incitement occurred only **after** A.C.'s brother's consistent web blogging, A.C.'s rhetorical question posed to the entire World Wide Web: "i **think** i am being insulted" (emphasis added), followed by Wong's wishful prayer: "do you think Virgin will give me stuff?"[13]

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[6] *See* Cain Depo., p. 20, l. 17- p. 21, l. 16; p. 23, l. 25 - p. 24, l. 12; p. 28, l. 8 - p. 29, l. 5; p. 29, l. 17 - p. 30, l. 5; p. 32, l. 23- p. 35, l. 7; p. 35, l. 17 - p. 36, l. 9; p. 39, l. 25 - p. 40, l. 12 (APP 5-37).

[7] *See* Cain Depo., p. 33, l. 16 - p. 34, l. 2; p. 35, l. 17 - p. 36, l. 9 (APP 5-37).

[8] *See* Cain Depo., p. 32, ll. 5-14; p. 32, l. 23 - p. 33, l. 3; p. 34, l. 21 - p. 35, l. 7; p. 35, l. 17 - p. 36. l. 9 (APP 5-37).

[9] *See* Cain Depo., p. 34, l. 21 - p. 35, l. 7; p. 35, l. 17 – p. 36. l. 9 (APP 5-37).

[10] *See* Cain Depo., p. 32., ll. 5-14; p. 32, l. 23 - p., 33, l. 7; p. 33, ll. 10-20; p. 34, l. 21 - p. 35, l. 4; p. 35, l. 17 - p. 36, l. 5; p. 46, l. 21 - p. 47, l. 15; p. 48, ll. 7-19 (APP 5-37).

[11] *See* Justin Ho-Yee Wong's affidavit attached as Exhibit 3 to Plaintiffs' Opposition does not establish any fact that needs to be controverted, i.e., that a contract was ever entered into in Texas with Virgin Australia, let alone breached, or that Virgin Australia purposefully availed itself of any benefit of the forum state. Rather, the affidavit which is silent as to any contract, situs, element or availment, states that Wong did not give an Australian company permission to use his photograph in Australia.

[12] Plaintiffs' Opposition at p. 5.

III. ARGUMENTS AND AUTHORITIES

It is black-letter law that a plaintiff bears the burden of proving that a court has personal jurisdiction over a defendant. *See, e.g., Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir. 1994); *Stuart v. Spademan*. 772 F.2d 1185, 1192) (5th Cir. 1985)(No personal jurisdiction in Texas, notwithstanding contract entered in Texas, shipment of goods in Texas, advertising in Texas, assignment of patent and Texas choice of law); *Wyatt v. Kaplan*, 686 F.2d 276, 280 (5th Cir. 1982)(Plaintiff did not discharge his burden to show a tort occurred in Texas). Further, mere conclusory allegations from a plaintiff will not be accepted as true. *Panda Brandywine Corp. v. Panda Global Holdings*, 253 F.3d 865, 868 (5th Cir. 2001)(The plaintiff must show the nonresident defendant's purposeful availment of the benefits and protections of and minimum contacts with the forum state). Moreover, plaintiff's allegations are not taken as true by the Court, when controverted by any recognized discovery method, including affidavits, interrogatories, depositions or oral testimony. *Stuart v. Spademan*. 772 F.2d 1185, 1192) (5th Cir. 1985). In the instant case, Plaintiffs have failed to meet their burden of proof.

A. Plaintiffs' Conclusory Comments Regarding a Contract with Plaintiff Wong.

Since Plaintiffs have not put forth any evidence,[14] and little argument regarding an alleged contract in Texas, Virgin Australia incorporates its arguments set forth in its Motion to Dismiss.[15]

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[13] *See* a copy of web posting(s) shortly after the alleged event by Plaintiffs A. C. and Wong (APP 3-4).

[14] *See* fn 11.

[15] Plaintiffs acknowledge the holding of *Stewart v. Hennesey*, 214 F. Supp. 2d 1198, 1203 (D. Utah 2002), where a defendant "knowingly" entered into a contract to avail itself of the privileges of the forum state, as opposed to the instant situation concerning activity on the other side of the world by two non-parties (Host and The Glue Society) who obtained a photograph from the World Wide Web for use in Australia with attribution to Wong.

B. A Third Party's Computer Server Does Not Create Personal Jurisdiction.

Plaintiffs incorrectly argue that personal jurisdiction is established by Defendant's alleged contacts with the Flickr server. No personal jurisdiction is created by a company's interaction with a server that is fortuitously located in a forum state. *See Ray v. Experian*, 2007 U.S. Dist. LEXIS 88425, at *8-9 (N.D. Tex. Nov. 30, 2007) (J. Buchmeyer); *see also, Amberson Holdings LLC v. Westside Story Newspaper*, 56 U.S.P.Q.2d 1847, 1849-50 (D.N.J. 2000) (host server connection, web host services, and website access in forum state do **not** create personal jurisdiction).

The first case that Plaintiffs cite is *Aitken v. Communications Workers of America*, 496 F. Supp. 2d 653 (E.D.Va. 2007). In *Aitken*, the issue of personal jurisdiction involved the sending of defamatory and disparaging emails (*i.e.*, spamming), where those emails were routed through particular servers located in Virginia. *Id*. at 658. In support of the *Aitken* court's finding of personal jurisdiction, it noted that Virginia has a specific statute conferring personal jurisdiction based on use of a computer or computer network located in Virginia. *See* Va. Code § 8.01 – 328.1(A)(3). The *Aitken* court then found that "defendant knew or reasonably should have known that by sending the emails to Verizon email addresses, their messages would necessarily go to Verizon servers," which is in line with spamming cases. *Id*. at 660.

The *Aitken* facts and holding differ from the instant case. First, Texas, unlike Virginia, has no particular statute conferring jurisdiction via the use of computers or computer networks in Texas. Thus, Texas' Long Arm Statute, by its terms, does **not** authorize the exercise of personal jurisdiction simply by use of computers or computer networks in Texas. Second, *Aitken* is limited to spamming, a situation where the emails were directed towards a certain group of users in a forum state. This is not the situation here. Unlike *Aitken* (where the alleged event was the sending of emails **into** the forum state), Virgin Australia's alleged event is the sending of a picture **out of** some undisclosed state (Texas has not been shown to be that state) to Australia. Thus, *Aitken* does not apply here.

Next, Plaintiffs cite *Hy Cite Corp. v. Badbusinessbureau.com*, 297 F. Supp. 2d 1154 (W.D. Wisc. 2004), where the Court correctly concluded that it did not have personal jurisdiction. That case involved a defendant who had a gripe site where consumers could submit and post complaints about companies. *Id*. at 1156. The plaintiff was one of the companies complained of, and it filed suit for unfair competition and trademark infringement. *Id*. Plaintiff argued that the gripe site could be accessed[16] by individuals in Wisconsin (the forum state), which defendant controverted as it did not engage in any repeated commercial transactions in Wisconsin, nor did it ever actively seek business in Wisconsin. *Id*. at 1161.

The next case that Plaintiffs cite is *Peridyne Technology Solutions v. Matheson Fast Freight*, 117 F. Supp. 2d 1366 (N.D. Ga. 2000). In *Peridyne*, the plaintiff and defendant had entered into a computer consulting agreement with a Georgia forum selection clause, which allowed the defendant access to its servers in Georgia. *Id*. at 1368-69. Plaintiff alleged illegal hacking and downloading of proprietary information. *Id*. Inapposite to *Peridyne*, there is no Texas forum selection clause in the instant case, as the referenced Yahoo/Flickr! license states that the proper forum is California. Second, Plaintiffs do not allege that Virgin Australia has illegally downloaded any information/data from a server in the forum state- assuming arguendo that a nexus with Texas exists, as Texas has not been shown to be the state where A.C.'s picture was obtained by Defendant's Australian vendors. Finally, the alleged tortious activity, *i.e.*, the ad campaign, was allegedly committed exclusively in Australia.

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[16] The *Hy Cite* case did not even involve the issue of server location. The servers in *Hy Cite* were always known to be outside of Wisconsin. On that basis alone, *Hy Cite* does not apply here. Additionally, the logic in *Hy Cite* cannot be transferred to this case. The flow of goods/services (in this case, electronic data/information) is flowing in the opposite direction; Virgin Australia is not placing any goods/services into Texas. Rather, Plaintiffs allege that Defendant is taking the picture of Alison Chang out of a state which they allege to be Texas. *Hy Cite* does not apply.

Finally, Plaintiffs cite *Internet Doorway v. Netdoor*, 138 F. Supp. 2d 773 (S.D. Miss. 2001). *Internet Doorway* involved the classic emailing spam case of Defendant (pretending to be the plaintiff) sending hundreds of emails to the forum State of Mississippi that contained messages to visit a pornographic website. *Id.* at 774. The Court found personal jurisdiction as the spam emails, as opposed to a websurfer, were "actively sent to the recipient in hopes that the recipient would read its contents and patronize the web-site it was promoting." *Id.* at 777.[17]

Internet Doorway does not involve any discussion of a server location. Like *Peridyne Technologies* above, *Internet Doorway* focuses on receipt of spam email. Moreover, *Internet Doorway* clearly illustrates that the instant Plaintiffs alleged tort did not occur in Texas, as A.C.'s picture was allegedly sent from Texas and used in Australia.

C. This Court Has Found No Personal Jurisdiction By Simply Accessing A Server In Texas.

Plaintiffs make the bold (and incorrect) assertion that no Texas court has tackled the issue of personal jurisdiction established by a non-resident defendant accessing a Texas server. This Court, in *Ray v. Experian*, 2007 U.S. Dist. LEXIS 88425, at *1-2 (N.D. Tex. Nov. 30, 2007), addressed this very issue. In *Ray*, the plaintiffs alleged that the defendant bank had violated the Fair Credit Reporting Act due in part to the defendant's negligence. *Id.* at *1-2. The defendant bank, located in North Carolina, moved to dismiss the lawsuit for lack of personal jurisdiction. In response, the plaintiffs argued that the court had personal jurisdiction over the defendant bank because of its "electronic communication with Experian's computer servers in Texas concerning" plaintiff's financial information. *Id.* at *8-9.

[17] *Internet Doorway* also involved the torts of libel and slander. *Id.* The *Internet Doorway* court held that the tort "was complete when the [spam] e-mail was opened by the recipient [in Mississippi], not when it was transmitted by" the defendant outside of the forum state. *Id.*

This Court disagreed and held that accessing a server physically located in Texas does **not** give rise to personal jurisdiction here. *Id*. at *9 ("accessing or sending data in North Carolina to or from a database which happens to be headquartered in Texas is not *purposeful* availment") (emphasis in original); *see also, Laughlin v. Perot*, 1997 U.S. Dist. LEXIS 4987 (N.D. Tex. Mar. 12, 1997) (J. Buchmeyer) ("accessing published information in California from a computer database service, which happens to be headquartered in Texas, are not *purposeful* availments by [defendant] of the benefits and protections of Texas' law") (emphasis in original).

The same is true here. Like the defendant bank in *Ray*, Virgin Australia is not located, nor does it transact business, in Texas. Simply because a server where Wong's and Chang's pictures are stored may **theoretically** be located in Texas does not give rise to any personal jurisdiction. *Id*. at *9. That is, even if Virgin Australia's vendors accessed Yahoo's server (which Virgin Australia denies, and assuming *arguendo*, that the applicable Yahoo! server is located in Texas[18]), "such accessing or sending" does not constitute any purposeful availment giving rise to the Court having personal jurisdiction over Virgin Australia. Moreover, while the location of Yahoo's servers may be of interest anecdotally, it serves no basis whatsoever to create personal jurisdiction over Virgin Australia in this case. Therefore, Plaintiffs' argument lacks merit and fails to establish this Court's personal jurisdiction over Virgin Australia.

Even if the Court theoretically assumes that Yahoo's server is in Texas, that fact alone is still insufficient to support the Court's exercise of personal jurisdiction over Virgin Australia. Plaintiffs cite *TravelJungle v. American Airlines, Inc.*, 212 S.W.3d 841 (Tex. App.-Fort Worth 2006, no writ) to further argue that the Court has personal jurisdiction over Virgin Australia.

[18] Plaintiffs support this notion by submitting the Affidavit of Shannon Chance-Baylor, a paralegal with Yahoo!. However, the extent of Shannon Chance-Baylor's Affidavit only affirmatively states that there is a server in Texas, not that the pictures alleged in **this case** were even located there. After three extensions of time for further discovery, Plaintiffs still cannot even confirm where the A.C. pictures were located, assuming *arguendo*, that would be a deciding factor.

Like the above cases, Plaintiffs' citation to *TravelJungle* also fails. In *TravelJungle,* the Fort Worth Court of Appeals opined that the location of a server matters **only** when it "specifically arises out of the conduct of which [plaintiff] complains." *Id*. at 850. In *TravelJungle* and the cases cited therein, specific jurisdiction is conferred via server location **only** when the alleged harm being claimed in the complaint is directed **towards** the server. *Id*. at 847, 850 (repeated unauthorized access to server affected server performance by using "valuable computer capacity").

Plaintiffs cannot, and are in no position to, make a similar claim here. First, the server at issue does not even belong to Plaintiffs, nor are they even remotely affected by the server's performance. Second, Plaintiffs' Complaint contains no allegations of harm to the server (*i.e.*, conduct that affected the server's performance, as was the case in *TravelJungle*). Therefore, Yahoo's server location, regardless of where it is (including Texas), remains a mere fortuity that is completely insufficient to establish personal jurisdiction over Virgin Australia in Texas in this case. *Ray*, 2007 U.S. Dist. LEXIS 88425 at *9, *Laughlin*, 1997 U.S. Dist. LEXIS 4987 at *23-24; *see also, Turner Schilling, LLP v. Gaunce Management, Inc.*, 247 S.W.3d 447, 456 (Tex. App. – Dallas 2008, no writ).

D. A "but-for" Approach Is Not Applicable To This Case.

Finally, Plaintiffs argue that a "but-for" connection between the parties necessitates a finding of personal jurisdiction. Like the others, this argument does not apply to the facts of the case. Plaintiffs cite *S&D Trading Academy LLC v. AAFIS, Inc.*, 494 F. Supp. 2d 558 (S.D.Tex. 2007) for the proposition that a "but-for" approach is proper here. However, the facts of *S&D Trading* are distinguishable and inapplicable here. In *S&D Trading*, the parties had entered into a performance contract that was negotiated in Texas, entered into in Texas, and performed in Texas. *Id*. at 567. There is no such trifecta of events in this case. Virgin Australia has never negotiated any agreement with Plaintiffs in Texas, has not entered into any agreement with Plaintiffs in Texas, and has not performed any agreement with Plaintiffs in Texas. Thus, *S&D Trading* fails on this reason alone as support for Plaintiffs' erroneous argument that the Court has personal jurisdiction over Defendant.

Further, to the extent that *S&D Trading* allows for personal jurisdiction to be established via the alleged tort of misappropriation arising from a party's contacts with the forum state, it is clearly limited to the tort of misappropriation. In *Internet Doorway* (*supra*), the court specifically noted that not all torts establish personal jurisdiction in that forum. The *Internet Doorway* court, commenting on trespass to chattels v. defamation, stated that defamation occurs not at the physical location from which an email was sent, but where it was published (*i.e.*, read) by the recipient. *Internet Doorway*, 138 F. Supp. 2d at 777.

The same is true here. Plaintiffs have alleged the tort of libel, not misappropriation (as in *S&D Trading*). The tort of libel occurs upon publication as the *Internet Doorway* court noted. *Id*. As such, *S&D Trading* does not apply, and Plaintiffs' "but-for" analysis fails as a matter of law.

IV. CONCLUSION

Defendant has shown that it is not subject to personal jurisdiction anywhere in the U.S., including in Texas based on either specific or general jurisdiction. Moreover, this Court's exercise of personal jurisdiction over Virgin Australia would not comport with traditional notions of fair play and substantial justice. It is also clear that the Plaintiffs have also failed to properly serve Virgin Australia under federal or state law. Thus, under Fed. R. Civ. P. 12(b)(2) and (5), Virgin Australia requests that the Court grant its motion to dismiss in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 8th day of August 2008, I electronically filed the foregoing "Defendant Virgin Mobile (Australia) Pty, Ltd.'s Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss" with the Clerk of Court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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